In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-438

IRVING D. LIPKOWITZ AND LEE J. GOLDWATER, EXECUTORS OF THE ESTATE OF LEO J. GOLDWATER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal estate tax case is whether decedent's bequest to a woman he "married" after obtaining an invalid Mexican divorce from his first wife was a bequest to a "surviving spouse" within the meaning of the marital deduction provisions of Section 2056 of the Internal Revenue Code of 1954 (26 U.S.C.). Both the Tax Court (Pet. App. B 10a-28a) and the court of appeals (Pet. App. A 1a-9a) held that decedent's bequest was ineligible for the estate tax marital deduction because it was not made to a "surviving spouse."

The pertinent facts are as follows: Decedent was a resident and domiciliary of the State of New York. He left a will bequeathing interests in property worth at least 50 percent of the value of his adjusted gross estate to Lee, whom he had "married" on December 9, 1958. Decedent

had previously married Gertrude B. Goldwater. In 1958, decedent had obtained a decree from a Mexican court "divorcing" him from Gertrude on the ground of their "incompatible temperaments." Shortly after decedent had obtained this Mexican decree and before he had "married" Lee, Gertrude began an action in the New York courts seeking a declaratory judgment that the Mexican divorce decree was invalid. In that action, decedent appeared and conceded that the divorce was invalid. The New York court thereupon entered a judgment declaring the Mexican divorce a nullity and further holding that Gertrude remained decedent's wife (Pet. App. B 11a-15a).

When decedent died, Gertrude filed a notice of election to take a share of his estate as provided under New York law for a "surviving spouse." Decedent's executors paid Gertrude $205,000 in compromise of that election. In the estate tax return they filed, however, decedent's executors claimed the maximum marital deduction allowable under Section 2056 of the Internal Revenue Code of 1954 on the theory that amounts left to Lee qualified as amounts passing to decedent's "surviving spouse" (Pet. App. B 15a-16a).

On audit, the Commissioner of Internal Revenue disallowed the claimed marital deduction to the extent the claimed amount exceeded the value of property passing to Gertrude. In a reviewed decision, the Tax Court unanimously upheld the Commissioner's determination (Pet. App. B 10a-28a). The court of appeals affirmed on the ground that the law of decedent's domiciliary state controlled the determination of his marital status (Pet. App. A 1a-9a).

1. The decision below correctly held that the decedent's bequest to Lee was not a bequest to a "surviving spouse" for purposes of the estate tax marital deduction. Section 2056 of the Code generally provides that an

estate may claim a deduction for the "value of any interest in property which passes or has passed from the decedent to his surviving spouse." The statute does not define the term "surviving spouse." Accordingly, pursuant to his authority under Section 7805(a) of the Code to "prescribe all needful rules and regulations," the Commissioner has announced that he will generally look to the law of the decedent's domicile to determine his marital status. See Rev. Rul. 67-442, 1967-2 Cum. Bull. 65.

Here, under the law of the decedent's domicile, Gertrude, and not Lee, was the decedent's "surviving spouse." From the time of his "marriage" to Lee in 1958, until his death in 1968, the decedent was domiciled in New York. In 1959, as a result of an action brought by Gertrude for a declaratory judgment decreeing the invalidity of decedent's Mexican divorce from her, the Appellate Division of the New York Supreme Court, First Department, held that the Mexican divorce was invalid and that decedent and Gertrude remained validly married. The court noted that decedent's "answering affidavit admits the invalidity of his Mexican divorce and asserts that he will not oppose * * * [Gertrude's] action for a declaratory judgment" (see Pet. App. A 3a). Since an intermediate appellate court of the state of decedent's domicile had concluded that decedent remained married to Gertrude, the Commissioner properly determined that only amounts passing from the decedent's estate to Gertrude qualified for the marital deduction as a bequest to a "surviving spouse."

2. Petitioners assert (Pet. 5, 9-10) that the decision below is inconsistent with *Borax' Estate* v. *Commissioner*, 349 F. 2d 666 (C.A. 2), certiorari denied, 383 U.S. 935; and *Feinberg* v. *Commissioner*, 198 F. 2d 260 (C.A. 3). Those cases upheld the deductibility as alimony of payments made by the taxpayer-husband as incident to a "decree of divorce" under Section 71(a) of the Code, despite the fact

that the courts of the taxpayers' domiciles had declared the foreign divorces obtained by them to be invalid.[1] In so holding, the court in *Borax' Estate* announced a "rule of validation" under which the subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is deemed to be of no consequence for purposes of the federal income tax deduction for alimony.[2]

Broadly construed, the rule of validation proposed in *Borax' Estate* might arguably conflict with the Commissioner's position sustained in this case that the law of the decedent's domicile will determine his marital status for tax purposes. However, the Second Circuit has not so construed its prior decision in *Borax' Estate*. As it stated

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[1]In *Wondsel* v. *Commissioner*, 350 F. 2d 339 (C.A. 2), certiorari denied, 383 U.S. 935, which petitioners also assert to conflict with the decision below (Pet. 4, 5), the Second Circuit followed its *Borax* holding in a situation where the courts of the first wife's domicile declared the foreign divorce to be invalid.

In Rev. Rul. 67-442, *supra*, the Commissioner announced that he would not follow *Borax' Estate* or *Wondsel*. The ruling stated that the Service generally will not question for federal income tax purposes the validity of any divorce decree unless a court of competent jurisdiction declares the divorce to be invalid. However, where a state court, in a proceeding in which there is personal jurisdiction of the parties or jurisdiction of the subject matter, declares the prior divorce to be invalid, the Service will usually follow the later court decision rather than the divorce decree for federal income tax purposes.

The ruling further announced that the Service will not follow *Borax' Estate* and *Wondsel* in the disposition of cases involving questions of marital status for estate and gift tax purposes, such as the marital deduction at issue here.

[2]*Borax' Estate* also held that the taxpayer was deemed to be married to his second "wife" for purposes of his eligibility to file a joint income tax return with her and to claim dependency exemptions for her parents and children of a former marriage (see 349 F. 2d at 675-676). However, this conclusion rested upon its primary holding that the invalid divorce would be given effect for purposes of the support payments claimed under the alimony deduction.

in this case, *Borax' Estate* carefully limited its holding to the alimony provisions of the Code (see 349 F. 2d at 670) and "does not purport to set forth a universal rule of tax code construction" (Pet. App. A 8a). Accord: *Estate of Steffke* v. *Commissioner*, 538 F. 2d 730 (C.A. 7), petition for a writ of certiorari pending, No. 76-315.[3]

Thus, unlike this case, where adoption of petitioners' position would produce the anomaly of a decedent having more than one "surviving spouse" for purposes of the estate tax marital deduction, *Borax' Estate* recognized that granting income tax effect to support payments made pursuant to otherwise invalid divorce decrees would conform to the entirely distinct congressional policy of placing the tax burden of "marriage settlement payments on the party entitled to their enjoyment" (349 F. 2d at 670; quoting from *Lerner* v. *Commissioner*, 195 F. 2d 296, 298 (C.A. 2)). Indeed, the court of appeals' refusal to extend its income tax holding in *Borax' Estate* to the estate tax area is in accord with the well-recognized rule that the estate and gift tax provisions are not to be construed in *pari materia* with the income tax statute. See *United States* v. *Davis*, 370 U.S. 65, 69 n. 6; *Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812, 814 (C.A. 2).[4]

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[3]We are serving a copy of our memorandum in opposition in *Estate of Steffke* (No. 76-315) upon counsel for the petitioners.

[4]*Estate of Spalding* v. *Commissioner*, 537 F. 2d 666 (C.A. 2), cited by petitioners (*passim*), does not reject the rule urged by the Commissioner in these cases that the law of the decedent's domicile should govern his marital status for tax purposes. There, the courts of the decedent's domicile had not spoken on the question of the validity of her husband's Nevada divorce and the Second Circuit was unwilling to assume that the California courts would have held the divorce to be invalid even though a New York court had held it invalid. Absent such a determination, the Nevada divorce stood unimpeached, even though it was likely that a California court would have annulled it by giving

3. Finally, petitioners contend (Pet. 10-14) that under New York law decedent's first wife Gertrude's failure to join his second wife Lee in Gertrude's declaratory judgment action challenging the validity of the Mexican divorce rendered the judgment of the New York court a nullity. Apart from the fact that this determination of state law does not warrant review by this Court, the court of appeals correctly concluded that under New York law there was no need to join Lee in the proceedings because the decedent conceded by affidavit that his Mexican divorce was invalid (Pet. App. A 8a). Under these circumstances, there was no need to join Lee, whom the decedent had not yet even "married," as a party to the litigation.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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full faith and credit to the New York judgment, had the question of the validity of the Nevada divorce been presented to a California court. Cf. *Borax' Estate* v. *Commissioner, supra,* 349 F. 2d at 676 (Friendly, J., dissenting).